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Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1959.

No. 656

HARRY HIRSCHKOWITZ and ROY SIMS,
Petitioners,

vs.

THE STATE OF OHIO,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

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TABLE OF CONTENTS.

Petition for Writ of Certiorari to the Supreme Court of Ohio	1
Opinion by Courts Below	2
Jurisdiction	2
Questions Presented for Review	2
Constitutional Provisions and Statutes Involved	4
Indictment	6
Statement of the Case	7
Argument	9
Law of Ohio	13
Equal Protection of the Law	18
Conclusion	21
Appendix: Judgment of the Supreme Court of Ohio	23

TABLE OF AUTHORITIES.

Cases.

Campfield vs. State, 91 Ohio Appeals 74, 105 North Eastern 2d 661	17
Cochran vs. State of Kansas, 316 U. S. 255, 86 Lawyer's Ed. 1453, 62 Supreme Court 1068	19
Dillingham vs. State, 5 Ohio State 280 (1855)	14
Dowd vs. United States, ex rel., Cook, 340 U. S. 206, 95 Lawyer's Ed. 215, 71 Supreme Court 262	19
Du Brul vs. State, 80 Ohio State 52, 87 North Eastern 837 (1909)	14, 15
Harris vs. State, 125 Ohio State 257, 181 North Eastern 104	15
Lamberton vs. State, 11 Ohio 282 (1842)	14
Ortega vs. Ragen, 216 Federal 2d 561, 7 Circuit Court of Appeals, Cert. den., 349 U. S. 940, 75 Supreme Court 786	20

Redmond vs. State, 35 Ohio State 81 (1878) 14

State vs. Collett, 44 Ohio Law Abstract 225, 58 North Eastern 2d 417 (1944) 16

State vs. Kearns, 126 North Eastern 2d 607 17

State vs. Knight, 54 Ohio State 365, 43 North Eastern 995 13

United States vs. Cruikshank, 92 U. S. 542, 23 Laws. Ed. 588 9, 11

United States vs. Hess, 124 U. S. 483, 31 Laws. Ed. 516, 8 Supreme Ct. 571 9, 12, 14

Texts.

12 *American Jurisprudence*, page 257 18

23 *American Jurisprudence*, page 753 10

24 *Ohio Jurisprudence 2*; pages 620 and 621 9-10

Wharton on Criminal Law and Procedure, 1957, Vol. 4, p. 552 11

Constitutions.

Constitution of Ohio, Art. I, Sec. 10 4

Constitution of the United States, Fourteenth Amendment 2, 4, 18

Statutes.

Ohio Revised Code:

Sec. 2907.21 4

Sec. 2941.05 4

Sec. 2941.06 5

Sec. 2941.07 5

Sec. 2941.08 6

28 U. S. C. 1257 2

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

Petitioners, Harry Hirschkowitz and Roy Sims, pray that a writ of certiorari issue to the Supreme Court of the State of Ohio to review the decision and the judgment of that court overruling motions filed therein by these petitioners to certify to that court the record of the Court of Appeals of the Eighth Appellate District of Ohio, in the cause wherein these petitioners were defendants, entitled *State of Ohio vs. Harry Hirschkowitz, et al.*, and the further order of the Supreme Court of Ohio denying the motions of these petitioners for leave to appeal to the Supreme Court of Ohio, and the order of the Supreme Court of Ohio denying petitioners' application for rehearing.

By its judgment and orders the Supreme Court of Ohio refused to review and, accordingly, permitted to stand as affirmed, the judgment of conviction of these petitioners of the offense of larceny by trick, which judgment had theretofore been affirmed by the Court of Appeals of the Eighth Appellate District.

The motions of these petitioners for leave to appeal were overruled on October 7, 1959, and petitioners' application for rehearing was denied on October 28, 1959.

OPINION BY COURTS BELOW.

Neither the trial court, the Court of Appeals, nor the Supreme Court of Ohio, rendered any opinion or furnished any memorandum in connection with their respective judgments.

JURISDICTION.

Jurisdiction to review the aforesaid judgments and orders is conferred on this Court by the Act of June 25, 1948, c. 646, 62 Stat. 929, Title 28, U. S. C. Sec. 1257. The portion of that section pertinent to jurisdiction in this review provides as follows:

> "Final judgments or decrees rendered by the highest court of a state in which a decision could be had may be reviewed by the Supreme Court as follows: * * * (3) By writ of certiorari, * * * where any title, right, privilege or immunity is specially set up or claimed under the Constitution, Treaties or Statutes of * * * the United States."

QUESTIONS PRESENTED FOR REVIEW.

Did the Supreme Court of Ohio deprive the petitioners of their constitutional rights, without due process of law, in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States by refusing to consider upon the merits, and thereupon to reverse, the judgment of the Court of Appeals of Ohio—

(a) Which upheld the sufficiency of an indictment charging only that the petitioners unlawfully obtained possession of money "by false and fraudulent representa-

tions and pretenses," and alleging nothing further with respect to the nature or the manner of exercise of such "false and fraudulent representations and pretenses," nor any facts upon which such charge was based;

(b) Which upheld the sufficiency of an indictment that, upon the trial of the case, in the absence of any allegations of fact, furnished the court with no standard or guide to determine what evidence was relevant and admissible and what evidence was not relevant and inadmissible, with respect to the claims of false representations and pretenses;

(c) Which upheld the validity, as applied to an indictment charging the criminal procurement of money by false and fraudulent pretenses, of an Ohio statute declaring that an indictment charging such offense is sufficient if it is couched "in the words of the section of the Revised Code describing the offense."

Did the Supreme Court of Ohio deprive the petitioners of their constitutional rights by failing to accord to them the equal protection of the law in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States by refusing to consider upon the merits, and thereupon to reverse, the judgment of the Court of Appeals of Ohio—

(a) Which refused to apply to the indictment the established rule in Ohio that an indictment must set forth the facts constituting the offense so that the accused may have notice of what he is to meet;

(b) Which refused to apply to the indictment the established rule in Ohio that a criminal charge must be preferred with such certainty and precision that the court may determine, without unreasonable difficulty, what evidence is admissible?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

Constitution of the United States, Amendment 14:

"All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Constitution of Ohio, Article I, Sec. 10:

"No person shall be held to answer for a capital or otherwise infamous crime unless on presentment or indictment of a grand jury * * *. In any trial in any court the party accused shall be allowed to appear and defend in person and with counsel to demand the nature and cause of the accusation against him and to have a copy thereof."

Revised Code of Ohio:

Sec. 2907.21:

"No person shall obtain possession of, or title to, anything of value with the consent of the person from whom he obtained it, provided he induced such consent by false or fraudulent representation, pretense, trick or writing.

"Whoever violates this section is guilty of larceny by trick and if the value of the thing so obtained is Sixty Dollars, or more, shall be imprisoned not less than one, nor more than seven years."

Sec. 2941.05:

"In an indictment or information charging an offense, each count shall contain, and is sufficient if it contains

in substance, a statement that the accused has committed some public offense therein specified. Such statement may be made in ordinary and concise language without any technical averments or any allegations not essential to be proved. It may be in the words of the section of the Revised Code describing the offense or declaring the matter charged to be a public offense, or in any words sufficient to give the accused notice of the offense of which he is charged."

Sec. 2941.06:

"An indictment may be substantially in the following form:

The State of Ohio:
County: ss

Of the term of _____ in the year of our Lord, one thousand nine hundred and _____ The jurors of the grand jury of the State of Ohio, within and for the body of the county aforesaid, on their oaths, in the name and by the authority of the State of Ohio, do find and present that A. B. on the ____ day of _____, 19__ aforesaid, did _____ (herein insert the name of the offense if it has one, such as murder, arson or the like, or if a misdemeanor having no general name, insert a brief description of it as given by law) contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Ohio.

_____ C. D.
Prosecuting Attorney

(Indorsed) A True Bill.
E. F. Foreman of the Grand Jury."

Sec. 2941.07:

"The following forms may be used in charging offenses; * * * Larceny. A. B. stole from C. D. * * * of the value of one hundred dollars."

Sec. 2941.08:

"An indictment or information is not made invalid, and the trial judgment or other proceedings stayed, arrested or affected: * * * (d) for stating imperfectly the means by which the offense was committed except insofar as means is an element of the offense * * *. (k) for other defects or imperfections which do not tend to prejudice the substantial rights of the defendant upon the merits."

INDICTMENT.

The indictment in this case contained two counts and is herewith set forth in full.

"The State of Ohio:
Cuyahoga County: ss

Of the term of September in the year of our Lord one thousand nine hundred and fifty-seven. The jurors of the grand jury of the State of Ohio, within and for the body of the County aforesaid, on their oaths, in the name and by the authority of the State of Ohio, do find and present; that Harry Hirschkowitz, Roy Sims and Leo Parker, on or about the 13th day of September, 1957, at the county aforesaid, did unlawfully obtain possession of certain money in the amount and value of One Thousand Dollars ($1,000.00) from Sam W. Levine, the property of Sam W. Levine, and did obtain said property from the said Sam W. Levine with the consent of the said Sam W. Levine, which consent the said Harry Hirschkowitz, Roy Sims and Leo Parker induced by false and fraudulent representations and pretenses, with the intent of permanently depriving said Sam W. Levine of said One Thousand Dollars ($1,000.00), contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Ohio.

Signed: John T. Corrigan, Prosecuting Attorney."

For a second count, the indictment reads in full:

"The State of Ohio:
Cuyahoga County: ss

Of the term of September in the year of our Lord one thousand nine hundred and fifty-seven. The jurors of the grand jury of the State of Ohio, within and for the body of the County aforesaid, on their oaths, in the name and by the authority of the State of Ohio, do find and present that Harry Hirschkowitz, Roy Sims and Leo Parker on or about the 20th day of August, 1957, at the county aforesaid, did unlawfully obtain possession of certain money in the amount and value of Three Hundred Dollars ($300.00) from James L. Altmeyer, the property of James L. Altmeyer, and did obtain said property from the said James L. Altmeyer with the consent of the said James L. Altmeyer, which consent the said Harry Hirschkowitz, Roy Sims and Leo Parker induced by false and fraudulent representations and pretenses, with the intent of permanently depriving said James Altmeyer of said Three Hundred Dollars ($300.00), contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Ohio.

Signed: John T. Corrigan, Prosecuting Attorney."

STATEMENT OF THE CASE.

This case is concerned only with the denial of petitioners' constitutional rights by reason of the insufficiency of the indictment. Neither the claims of the respective parties concerning the facts of the case, nor the evidence received during the trial, relate to the questions raised. Accordingly, there will be no discussion here either of such claims or of the evidence.

At the outset of the trial and before any evidence was received, the petitioners moved that the indictment be

quashed as insufficient. (R. p. 12.) That motion was overruled.

Prior to the trial the petitioners had requested the prosecutor to furnish a bill of particulars. A purported bill of particulars was furnished in response to this request, which under the law of Ohio cannot be considered as in any way aiding the sufficiency of the indictment or correcting any deficiency in the indictment.

As to each count in the indictment with respect to the "false and fraudulent representations and pretenses" which allegedly "induced" the complaining witnesses to part with the "certain money" designated in each count, the bill of particulars asserted only that the petitioners "acting in concert and by the use and means of an artifice and scheme, commonly known as three-card Monte, and through such artifice and scheme and false representations made pursuant thereto" unlawfully obtained the possession of the money referred to in the indictment. No additional claims with respect to the alleged false and fraudulent pretenses, and no facts concerning them, were set forth in the bill of particulars, the remainder of which consisted only of a repetition of the language of the indictment.

Again, for each of these petitioners, a motion was made before the presentation of any evidence (R. pp. 48 and 55) that they be discharged on the basis of the indictment and the opening statement of the prosecutor. Those motions likewise were overruled.

Upon appeal to the Court of Appeals of the Eighth Appellate District of Ohio, the first and foremost claim of error presented related to the insufficiency of the indictment. It was there contended (Petitioners' brief p. 5) that "the indictment must state the crime charged with certainty and precision and set out the facts which constitute

the same, so as to advise the accused of what he may expect to meet on the trial of the case. This is a constitutional right and cannot be dispensed with by the Legislature, nor has it been."

The same contention was presented upon the briefs filed by petitioners in the Supreme Court of Ohio in support of their motions to certify and for leave to appeal. Petitioners' brief in support of their application for rehearing relied strongly upon two decisions of this Court to which reference will be made hereafter: *United States vs. Cruikshank*, 92 U. S. 542, 23 Laws. Ed. 588, and *United States vs. Hess*, 124 U. S. 483, 31 Laws. Ed. 516, 8 Supreme Ct. 571.

ARGUMENT.

In essence this case involves the important question as to how far the State of Ohio—or any state for that matter—may go in "simplifying" criminal procedure without violating basic constitutional rights of the accused.

This Court has on occasion upheld the validity of statutes intended to modernize and streamline criminal procedure. Nothing, however, that this Court has said justifies upholding the sufficiency of an indictment of an accused based upon the broad ground of fraud and false pretenses without any allegation of facts or specific claims sufficient to enable the accused to know the nature of the charges which he will be required to meet at the time of trial.

An indictment which charges the commission of an offense "induced by false and fraudulent representations and pretenses" charges at the same time everything and nothing. This fact is implicitly recognized by the standard encyclopedic text of the law of Ohio, under the title "Fraud and Deceit," in Vol. 24 *Ohio Jurisprudence 2*,

pages 620 and 621. Referring to the term "fraud," it is there stated:

> "The term admits of no positive definition and cannot be controlled in its application by fixed and rigid rules. It is sometimes said to consist of any kind of artifice employed by one person to deceive another, or of some wilful act or omission which is unconscientious and a violation of good faith and by which one person obtains an undue advantage over another. By fraud is meant all surprise, trick, cunning, dissembling and other unfair ways that are used to cheat another. It is a deception deliberately practiced with a view to gaining an unlawful or unfair advantage * * *.
>
> "False pretenses means any trick or device whereby the property of another is obtained * * *. Fraud is multifarious in its form and is always assuming new forms."

In Vol. 23, *American Jurisprudence*, at page 753, under the same title, "Fraud and Deceit," it is stated:

> "In fact the fertility of man's invention in devising new schemes of fraud is so great that courts have always declined to define it, reserving to themselves the liberty to deal with it under whatever form it may present itself."

It is for this very reason that when an accused in a criminal case is indicted for an offense allegedly resulting from fraud or false representations and pretenses, he is entitled to be informed, as a part of the statement of the charge against him, of the precise nature of the fraud against which he will be required to defend upon the trial of the case. The necessity of complying with the constitutional rights of the accused is scarcely satisfied by the feeling of the prosecutor that the accused "knows what this case is all about."

The general rule applicable to this question will be found in the latest revised edition of *Wharton on Criminal Law and Procedure*, 1957, Vol. 4 p. 552:

> "*The fact that the counts of an indictment or information are in the form prescribed by statute will not save them from the constitutional objection that they did not sufficiently disclose the cause and nature of the accusation* * * *.
>
> "Whether at common law or under statute, the accusation must include * * * such description of the particular act alleged to have been committed by the accused as will enable him properly to defend against the accusation, and the description of the offense must be sufficiently full and complete to accord to the accused his constitutional right to due process of law.
>
> "The offense and the essential elements thereof must be alleged * * * not by way of recital or mere legal conclusions and unaided by intendment or inference."

This Court has on many occasions inquired into the sufficiency of indictments. We respectfully direct the attention of the Court to the following two cases, *U. S. vs. Cruikshank*, 92 U. S. 542, 23 Laws. Ed. 588:

Court:

> "It is an elementary principle of criminal pleading that where the definition of an offense, whether it be at common law or by statute, includes generic terms, *it is not sufficient that the indictment shall charge the offense in the same generic terms* as in the definition; but it must state the species; it must descend to particulars. * * * For this; *facts are to be stated, not conclusions of law alone* * * *.
>
> "Offenses created by statute, as well as offenses at common law, must be accurately and clearly described in an indictment; and *if the offense cannot be so*

described without expanding the allegations beyond the mere words of the statute, then it is clear that the allegations of the indictment must be expanded to that extent * * *.

"Every offense consists of certain acts done or omitted under certain circumstances; and in the indictment for the offense, it is not sufficient to charge the accused generally with having committed the offense, but all the circumstances constituting the offense must be specially set forth."

United States vs. Hess, 124 U. S. 483, 31 Laws. Ed. 516, 8 Supreme Ct. 571:

Syl. 1:

"Revised Statutes U. S. Sec. 5480, renders it criminal for any person, having devised a scheme or artifice to defraud other persons by inciting them to open communication with him through the post office, to place any letter in or to receive any letter from any post office, held—that **an indictment under the statute is insufficient which only charges the offense in general language without disclosing the particulars of the alleged scheme or artifice to defraud.**"

Court:

"The statute upon which the indictment is founded only describes the general nature of the offense prohibited; and the indictment, in repeating its language without averments disclosing the particulars of the alleged offense, states no matters upon which issues could be formed for submission to a jury * * *.

"The statute is directed against 'devising or intending to devise, any scheme or artifice to defraud,' to be 'effected by communication through the post office. **As a foundation for the charge, a scheme or artifice to defraud must be stated, which the accused either devised or intended to devise, with all such particulars as are essential to constitute the scheme or**

artifice, and to acquaint him with what he must meet on the trial * * *.

"The absence of all particulars of the alleged scheme renders the count as defective as would be an indictment for larceny without stating the property stolen, or its owner or party from whose possession it was taken.

"The doctrine invoked by the Solicitor General that it is sufficient, in an indictment upon a statute, to set forth the offense in the words of the statute, does not meet the difficulty here.

"*Undoubtedly the language of the statute may be used in the general description of an offense, but it must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offense, coming under the general description, with which he is charged.* * * * Following this rule, it must be held that the second count of the indictment before us does not sufficiently describe an offense within the statute.

"The essential requirements, indeed, or the particulars constituting the offense of devising a scheme to defraud, are wanting. Such particulars are matters of substance and not of form and their omission is not aided or cured by the verdict."

We believe the principles enunciated in the above cases are peculiarly and particularly appropriate to the case at bar. Significantly, the decision of this Court in the *Hess* case was cited with approval in the opinion of the Supreme Court of Ohio in the case of *State vs. Knight*, 54 Ohio State 365, 375, 43 North Eastern 995, 996.

Law of Ohio.

The judgments of the various Ohio courts in the instant case might lead an impartial observer to believe that the established law of Ohio differs from the prin-

ciples enunciated by this Court in the above cases. Nothing can be further from the truth. The established law in the State of Ohio conforms precisely to the principles set forth by this Court in the *Hess* case. It was, in fact, established more than one hundred years ago. The following statements are examples taken from several of the many cases in which that law has been pronounced by the Supreme Court of Ohio:

Lamberton vs. State, 11 Ohio 282 (1842), Syl. 1:

"An indictment must set forth the facts constituting the crime, so that the accused may have notice of what he is to meet, of the act done which it behooves him to controvert so that the court applying the law to the facts charged against him may see that a crime has been committed."

Dillingham vs. State, 5 Ohio State 280 (1855), Opinion:

"'The nature and cause of the accusation' are not sufficiently stated to enable the accused to know what he might expect to meet upon the trial; and it is neither consistent with general principles nor constitutional safeguards to allow a man to be thus put to trial upon a criminal charge in the dark."

Redmond vs. State, 35 Ohio State 81 (1878), Opinion:

"It is a rule of criminal law based upon sound principles that *every indictment should contain a complete description of the offense charged. It should set forth the facts constituting the offense so that the accused may have notice of what he is to meet*, and so that the court applying the law to the facts charged against him, may see that a crime has been committed."

Du Brul vs. State, 80 Ohio State 52, 87 North Eastern 837 (1909).

Syl. 1:

"*A criminal charge should be preferred with such certainty and precision* as will reasonably apprise the party charged with that which he may expect to meet and be required to answer and *so that* the court and jury may know what they are to try, and the *court may determine without unreasonable difficulty what evidence is admissible.*"

Syl. 2:

"**An indictment** brought under Sec. 7075, Revised Statutes, charging the presentation to the county commissioners of a false and fraudulent claim, and obtaining payment of the same by the county treasurer **which, in describing the claim** avers it to have been 'a certain false and fraudulent claim' but in no way avers wherein it was false and fraudulent and **states no facts showing that it was false or fraudulent, is bad on demurrer and will not support a conviction.**"

On the face of it, the pronouncements of the Supreme Court of Ohio in the *Du Brul* case obviously applied to, and should have been applied by the court to, the indictment in the instant case. That case, although decided fifty years ago, is still the law in Ohio.

In 1929 the Legislature of Ohio enacted a "modern" code of criminal procedure, for the purpose of simplifying and streamlining practice in this field. In the thirty years which have elapsed since the new code of criminal procedure was enacted, the Supreme Court of Ohio has only once determined the effect of the new provisions upon the constitutional rights of the accused. This was done in the case of *Harris vs. State*, 125 Ohio State 257, 181 North Eastern 104, decided in 1932, at which time the Court declared.

Syl. 4:

"While the court recognizes and will apply the liberal provisions of the criminal code (General Code 13437-4, now Revised Code 2941.05) it will uphold the constitutional right of an accused to be advised in the indictment of the nature and cause of the accusation he is expected to meet.

"And if a vital and material element identifying or characterizing the offense be omitted from such indictment, the indictment is insufficient to charge an offense and cannot be cured by the court."

Opinion (p. 260):

"The indictment is faulty in two respects. It is indefinite in that it does not state what the fine and costs were which he (the defendant) falsely represented to the prosecuting witness * * *.

"*While we recognize and will apply the liberal provisions of the present criminal code, which gives wide latitude to the courts with respect to the curing of indictments, and their review by the appellate courts, we cannot do so where the accused's constitutional rights are violated and he has been prejudiced thereby.*"

Before turning to the question of the effect upon the constitutional rights of the petitioners of the failure of the courts of Ohio to apply to the indictment in this case the established law of Ohio, this Court should be advised concerning the function and effect of a bill of particulars under the law of Ohio. This question has not been determined by the Supreme Court of Ohio, but has been considered and decided in two recent cases by the Courts of Appeals of Ohio.

In the case of *State vs. Collett*, 44 Ohio Law Abstract 225, 58 North Eastern 2d 417 (1944), the rule is an-

nounced in paragraph 2 of the syllabus in the Northeastern Reporter, as follows:

"A bill of particulars is designed to be used only where indictment is sufficient on demurrer."

Campfield vs. State, 91 Ohio Appeals 74, 105 North Eastern 2d 661:

Syl. 4 (105 North Eastern):

"Indictment failing to state offense could not be cured by bill of particulars."

Opinion:

"The office of a bill of particulars is to supply the accused and the court additional information concerning an accusation that the defendant has committed an act or acts constituting a criminal offense.

"It is designed to be used only where the indictment is sufficient on demurrer * * *.

"The infirmity in the indictment here is not that it is uncertain, vague or irregular, but that it states no offense."

State vs. Kearns, 126 North Eastern 2d 607:

Syl. 2:

"The furnishing of a bill of particulars does not deprive defendant of right to file motion to quash indictment."

It is one of the basic rights of an accused that he may not be convicted of an offense consisting of acts other than those charged against him by the grand jury in the indictment. In the instant case, it is impossible to determine from the indictment what act or acts the petitioners were charged by the grand jury with having committed.

The charge that the petitioners obtained money "by false and fraudulent representations and pretenses" contains only a conclusion of law so broad that evidence of any

act or acts charged against the petitioners could be received at will by the trial court, without any standard of relevancy or pertinency by which the propriety of the court's rulings could possibly be tested; nor can it possibly be determined now that the petitioners in this case were actually convicted of the offense which the grand jury had *in mind*, but did not charge in the indictment.

Equal Protection of the Law.

It is submitted that the failure of the courts of Ohio to apply to the indictment in this case the established law of Ohio constituted a denial to the petitioners of the equal protection of the law guaranteed by the provisions of the Fourteenth Amendment to the Constitution of the United States.

When the question at issue is the validity and sufficiency of an indictment, and the state has established principles of law the application of which will determine that the indictment is insufficient and states no offense, but the state, through its courts, refuses to apply the established rules which have been applied to numerous comparable cases, the equal protection of the law has been denied.

In Vol. 12, *American Jurisprudence*, at page 257, is the following summarization of the applicable principles:

> "The purpose of the equal protection clause of the Fourteenth Amendment to the Federal Constitution is to secure every person within the state's jurisdiction against intentional and arbitrary discrimination, whether occasioned by the express terms of a statute or by its improper execution through duly constituted agents. An actual discrimination arising from the method of administering a law is as potential in creating a denial of equality of rights as a discrimination made by law."

The same result follows and the same principle applies whether the discrimination arises from the administration of a state statute by the executive or the administration through the courts of the law established by the courts.

In the case of *Cochran vs. State of Kansas*, 316 U. S. 255, 86 Lawyer's Ed. 1453, 62 Supreme Court 1068, the petitioner in a habeas corpus proceeding alleged certain denials of his rights by the trial judge, among them the claimed denial of the right to summon witnesses and to testify on his own behalf as well as action by officials of the state penitentiary making it impossible for him to perfect an appeal within the period provided by Kansas law. In the opinion of this Court, it is noted:

> "The state properly concedes that if the alleged facts pertaining to suppression of Cochran's appeal 'were disclosed as being true before the Supreme Court of Kansas, there would be no question but that there was a violation of the equal protection clause of the Fourteenth Amendment.'"

In the case of *Dowd vs. United States, ex rel., Cook*, 340 U. S. 206, 95 Lawyer's Ed. 215, 71 Supreme Court 262, this Court held:

Syl. 1 (71 Supreme Court):

> "A discriminatory denial of the statutory right of appeal to one convicted of an offense in state court was a violation of equal protection clause of the Fourteenth Amendment" and

Syl. 4 (71 Supreme Court):

> "Where petitioner had been denied equal protection in violation of the Fourteenth Amendment in that he has been prevented by state prison officials from sending out his appeal papers and thereby taking appeal from his conviction in state court, nothing short of an actual appellate determination of the merits of the convic-

tion according to procedure prevailing in the ordinary cases would cure the original denial of equal protection."

The above cases involve a denial of equal protection of the law through a denial of procedural rights. The instant case involves a denial of an even more basic right resulting in the trial and conviction of the petitioners upon an indictment which under the established law of the state of Ohio charges no offense.

One other brief reference will be made to the case of *Ortega vs. Ragen*, 216 Federal 2d 561, 7 Circuit Court of Appeals, Cert. den., 349 U. S. 940, 75 Supreme Court 786. Court:

"If appeals are provided for there must be no arbitrary discrimination, and if plaintiff could show he was not allowed to appeal his conviction while others in his position were, he would show deprivation of his right to equal protection."

Pertinent to the instant proceeding the case stands for the proposition that a denial of the equal protection of the law may result as well from the conduct of the judicial branch of the government as from the conduct of the legislative or executive branches.

CONCLUSION.

It is not only of paramount importance to the petitioners in this case that the rights guaranteed to them by the Constitution of the United States be preserved by he courts of Ohio, but it is of great importance to all who hereafter may be charged with violation of a number of the statutes of Ohio grounded upon alleged fraud and false representations, that, as the Supreme Court of Ohio once cogently observed, the state should not "allow a man to be thus put to trial upon a criminal charge in the dark."

Official Ohio statistics for 1958, the latest available, disclose 1,276 indictments filed during that year involving charges of embezzlement and fraud. The calculable number of accused who will assuredly be subjected to similar deprivation of their constitutional rights over any given period is enormous.

When consideration is given to the infinite variety of circumstances and conduct which may be characterized as fraud or which the state may attempt to bring within the meaning of false representations, surely the state should be required to frame its indictment so that the accused is informed of the acts which are alleged to constitute a criminal offense. Equally it is important that the trial court should be required to limit the admissibility of evidence by testing its relevancy against the acts charged in the indictment. Where no specific act or acts are charged, the court is free to admit evidence of any act or conduct which in the court's view tends to establish any kind of fraud, and the entire basis of due process of law, as applied to the trial of the charge, begins to crumble and fall.

Unless this Court intervenes and requires that not only basic principles of due process but, to assure to all persons similarly accused that the established law of the State of Ohio be applied in this case, the State of Ohio will

continue the practice followed in this case of trying accused persons upon charges which state nothing more than unsubstantial legal conclusions, charges which in fact, as well as in law, state nothing against which the accused may, or should be required to, defend.

Respectfully submitted.

EDWIN F. WOODLE,
JEROME B. GOLDMAN,
Counsel for Petitioners,
Harry Hirschkowitz and Roy Sims.

APPENDIX.

Journal Entry of the Court of Appeals of Cuyahoga County, Ohio.

DATED: February 20, 1959

This cause came on to be heard on the appeal on questions of law from the judgment of the Court of Common Pleas, and was argued by counsel for the parties; and upon consideration of all of the errors assigned, the Court finds no error prejudicial to the appellants and therefore the judgment of the Court of Common Pleas is affirmed.

It is ordered that a special mandate issue out of this Court directing the Court of Common Pleas to carry this judgment into execution. Appellants except.

Journal Entry of the Supreme Court of Ohio on Motion for Leave to Appeal.

DATED: October 7, 1959

It is ordered by the Court that this motion be, and the same hereby is, overruled.

Journal Entry of the Supreme Court on Application for Re-hearing.

DATED: October 28, 1959

Upon consideration of the above application for re-hearing, it is ordered by the Court that re-hearing be, and the same hereby is, denied.